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CITATIONS

720548—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 594

CHARLES P. GOTWALS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not write an opinion; its findings and conclusions appear at R. 13–30. The opinions of the circuit court of appeals (R. 139–147) are reported in 156 F. 2d 692.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 19, 1946 (R. 147). A petition for rehearing was denied on August 21, 1946

(R. 149), and the petition for a writ of certiorari was filed on October 10, 1946. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, where an insolvent judgment debtor of the United States assigns to a third party creditor his claim to funds in possession of the Government with an intent to prefer that creditor over the United States, a priority in favor of the Government arises under R. S. 3466, 31 U. S. C. sec. 191, entitling it to apply the funds in question in partial payment of its judgment.

STATUTES INVOLVED

R. S. 3466, 31 U. S. C. sec. 191, reads as follows:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

11 U. S. C. sec. 21, so far as here material, provides:

> *Acts of bankruptcy.* (a) Acts of bankruptcy by a person shall consist of his having * * * (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; * * *.

STATEMENT

The facts in this case are not in dispute. The United States, on behalf of restricted Indian wards, sued one H. G. House for an accounting of certain restricted funds and property. *Leona Richards Fox et al., and The United States, Intervenor* v. *H. G. House,* Civil No. 49 (E. D. Oklahoma), hereinafter referred to as the *House* case. Following trial the district court on October 12, 1942, entered its findings and conclusions (R. 91–124), in which the court concluded that House was liable to the United States in the amount of $39,583.00. Judgment in favor of the Government against House was entered on November 7, 1942, in the amount of $76,860.84, this amount reflecting the principal amount of House's liability and accrued interest (R. 125). That judgment was affirmed on appeal. *House* v. *United States,* 144 F. 2d 555 (C. C. A. 10), certiorari denied, 323 U. S. 781. A writ of execution issued upon the judgment was returned "nothing found" (R. 126–

127), and the judgment has never been paid wholly or in part (R. 2). Petitioner Gotwals acted as counsel for House in defending that suit (R. 11, 17).

During the pendency of the above case there was also pending in the district court the case of *In re Estate of Jackson Barnett, deceased,* Equity No. 4556, hereinafter referred to as the *Barnett* case, in which House acted as counsel for certain Indian claimants to the estate, and in which cause also the United States intervened (R. 13). On October 27, 1942, fifteen days after the entry of findings and conclusions in the *House* case providing for judgment in favor of the Government against House, and eleven days before the judgment was formally entered, House assigned to petitioner all fees and proceeds to accrue to House in the *Barnett* case (R. 135–136). While the assignment bore the date of October 27, 1942, the petitioner did not reveal its existence until November 22, 1944, over two years later, when he sent a copy of the assignment to the Superintendent of the Indian Agency (Gov't Ex. 6, R. 137).

On June 23, 1943, a decree was entered against the United States in the *Barnett* case which awarded House an amount of $13,582.79 (R. 2, Fdgs R. 17–18). That decree was affirmed on appeal, *sub nom. United States* v. *Anglin & Stevenson,* 145 F. 2d 622 (C. C. A. 10), certiorari denied, 324 U. S. 844. Thereafter the United

States paid into the registry of the district court sufficient funds to satisfy the claims of all parties under the aforementioned decree with the exception of the claim of House. Since the Government had an unsatisfied and uncollectible judgment against House in the amount of $76,860.84, it withheld $13,582.79, the amount awarded House in the *Barnett* case.

The Government filed in the *House* case, Civil No. 49, its petition (R. 1–4) setting out the foregoing facts; so far as presently material, it was alleged that House was insolvent at the time he executed the assignment to petitioner, and that the United States, as a judgment creditor of House, was entitled to priority to the funds due House. The Government asked that it be allowed a credit of $13,582.79 on the *Barnett* judgment and that House be allowed a similar credit on the judgment against him in the *House* case. A similar petition was filed in the *Barnett* case (R. 5–8).

Notice of these petitions was served upon House and petitioner Gotwals. House did not answer, but petitioner did. For present purposes the answer may be summarized as alleging that House was indebted to Gotwals for legal services rendered in an amount in excess of the $13,582.79 covered by the assignment; that the assignment was obtained by petitioner for the sole purpose of collecting his fees; that House

had a right to make the assignment and that petitioner had a right to accept it and to retain the benefit of it. The answer closed with a prayer for dismissal of the Government's petition and for an order directing payment of the $13,582.79 to petitioner (R. 9–13).

At the trial the Government called House and petitioner as witnesses. Both testified that the assignment of October 27, 1942, was based upon consideration in the form of indebtedness of House to Gotwals for legal services in various cases. The testimony of House established that at the time he executed the assignment he had insufficient property to pay his debts; his testimony also shows that he intended to prefer petitioner over the United States (R. 54–55). Petitioner, as counsel for House, knew all of the facts, and his testimony (R. 58–59, 73) shows that in obtaining the assignment from House he "wanted to be a preferred creditor" (R. 59).

The trial court found that House was indebted to Gotwals in an amount in excess of the fund covered by the assignment and that therefore the assignment was valid. So nearly as can be determined, that court simply concluded that since the assignment was valid as between House and the petitioner, and since Oklahoma law permitted an insolvent debtor to prefer a creditor, no priority to the fund existed in favor of the United States under 31 U. S. C. sec. 191 (R. 13–30).

Judgment in favor of petitioner was duly entered, from which judgment the Government appealed (R. 30–31).

Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, it was held, with Judge Phillips dissenting, that the execution of the assignment by House while insolvent, with the intent to prefer petitioner over the United States, constituted an act of bankruptcy; that accordingly a priority arose in favor of the United States under the federal priority statute, and that the judgment should be reversed (R. 139–144). In his dissenting opinion Judge Phillips agreed that an act of bankruptcy was committed by House when the assignment was executed, but was apparently of the view that the priority could be asserted by the Government only in a bankruptcy proceeding instituted within four months of the date of the assignment (R. 144–147).

ARGUMENT

R. S. 3466, 31 U. S. C. sec. 191 has always been liberally construed to effectuate its obvious intent to assure prior settlement of federal indebtedness. *Beaston* v. *Farmers' Bank,* 12 Pet. 102, 134; *Bramwell* v. *U. S. Fidelity Co.,* 269 U. S. 483, 487. The priority arises whenever one of three independent grounds stated in the statute is made to appear. *Conard* v. *Atlantic Ins. Co.,* 1 Pet. 386, 438, 439; *United States* v. *State Bank of*

North Carolina, 6 Pet. 29, 35; *Field* v. *United States,* 19 Pet. 182, 201; *United States* v. *Oklahoma,* 261 U. S. 253, 259–262. And whenever a transfer of property by the Government's insolvent debtor is in one of the modes named in the statute, the party receiving the same holds the property as trustee for the Government's benefit. *Beaston* v. *Farmers' Bank,* 12 Pet. 102, 133.

One of the independent acts of an insolvent debtor which generates the priority is the commission of an act of bankruptcy. The court below found (R. 142, 144) that in making the assignment to petitioner, House intended to prefer petitioner over the United States, and that his act constituted an act of bankruptcy under 11 U. S. C. sec. 21. Petitioner does not challenge this finding.[1] Moreover, while the intention of House to prefer is sufficient to constitute the act of bankruptcy, it may be noted that petitioner testified that he "wanted to be a preferred creditor of Mr. House" and that he did not know if House could pay the Government's judgment against him (R. 59, 73). Thus the intent of both parties was to avoid the "clear command" of the statute. Cf. *Illinois* v. *United States,* No. 749, October Term, 1945.

Petitioner (Pet. 5) seemingly seeks to avoid the statute by arguing that an assignment for

[1] Neither does petitioner question that House was insolvent within the meaning of the priority statute.

the benefit of all creditors is essential to the existence of the priority. But a voluntary assignment is but one of the actions of a debtor which raises the priority. The ground of decision below is the admitted existence of the third independent ground, the commission of an act of bankruptcy. The language quoted by petitioner from this Court's decision in *Bramwell* v. *U. S. Fidelity Co.,* 269 U. S. 483, does not support his argument. On the contrary, this Court there said (269 U. S. 487): "Appellee is entitled to priority if, within the meaning of § 3466, the bank made a voluntary assignment of its property *or committed an act of bankruptcy.*" [Italics supplied.]

Petitioner, while not questioning that the assignment was made to prefer him over the Government, and thus constituted an act of bankruptcy as defined by 11 U. S. C. sec. 21, relies upon the law of Oklahoma as permitting an insolvent debtor to prefer a creditor (Pet. 4, 8). But state law cannot affect the Government's priority under the federal statute. *Field* v. *United States,* 9 Pet. 182, 200; *United States* v. *Oklahoma,* 261 U. S. 253, 260; cf. *Sperry Oil Co.* v. *Chisholm,* 264 U. S. 488, 494.

The cases cited by petitioner (Pet. 7–8) lend no support to his position. *United States* v. *Oklahoma,* 261 U. S. 253, dealt only with the test of insolvency under R. S. 3466, a matter not in ques-

tion here. *United States* v. *Fisher,* 2 Cranch 358, held that the priority statute was aimed not only at debts due the Government from revenue officers and custodians of public funds, but embraced debts due the United States from all classes of debtors. *Thelusson* v. *Smith,* 2 Wheat. 396, does not, as petitioner suggests, hold that the priority arises only where there has been a voluntary assignment. The court was simply stating the proposition, already settled by *United States* v. *Fisher, supra,* and *United States* v. *Hooe,* 3 Cranch 73, that a mere state of insolvency, without more, did not give rise to priority. The *Thelusson* case held only that a lien existing upon a debtor's property before the federal priority accrued was protected. The facts in *United States* v. *Hooe,* 3 Cranch 73, bear no resemblance to those in the case at bar; no question of the effect of the commission of an act of bankruptcy was presented.

The cases of *Van Iderstine* v. *Nat. Discount Co.,* 227 U. S. 575, and *Adams* v. *Champion,* 294 U. S. 231, are not in point because no question of federal priority under R. S. 3466 was involved in either. So far as the instant case is concerned, the bankruptcy law, 11 U. S. C. sec. 21, simply defines the nature of an act by an insolvent debtor to the Government which Congress has ordained shall create the priority. As stated by this Court

in *Bramwell* v. *U. S. Fidelity Co.*, 269 U. S. 483, 490:

> * * * The reference to an act of bankruptcy in § 3466 is general, and is for the purpose of defining one of the ways in which the debtor's insolvency may be manifested. The priority given does not depend on any proceeding under the bankruptcy laws of state or nation.

It may also be noted, with regard to Judge Phillips' view (R. 145), that by reason of the concealment of the assignment by petitioner for a period of two years, no proceeding in bankruptcy could have been brought within four months of the date of the assignment. Moreover, the priority statute itself fixes the time when the priority takes effect, and the existence of the priority does not depend upon the time of bringing an action to enforce it. *United States* v. *Fisher*, 2 Cranch 358, 393. To hold that the Government's priority could only be enforced in bankruptcy proceedings would read into the statute a limitation upon the priority granted which Congress did not see fit to impose.

CONCLUSION

Petitioner and House clearly undertook to secure a preference for petitioner over the claim of the United States; he does not contend otherwise. Since the act of House under which petitioner claims is the very act upon which Congress

has seen fit to base the priority of the United States, his position here is untenable. The question presented was correctly decided below, no conflict of decision is shown, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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